BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CENTRAL INDUSTRIES, INC. Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 87-88 FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER (Draft)

Central Industries, Inc. and Baugh Construction Company appealed to this Board Puget Sound Air Pollution Control Agency's ("PSAPCA") issuance of Notice and Order of Civil Penalty (No. 6680; $1,000) for alleged January 22, 1987 violations of PSAPCA's Regulation I, Sections 10.04 and 10.05 in handling asbestos. This became our PCHB Nos. 87-88 and 87-155. Subsequently, Baugh and PSAPCA settled, and an Order of Dismissal in PCHB No. 87-155 was entered.

The formal hearing was held on April 18, 1988 and May 13, 1988. Appellant Central was represented by Attorney Douglas W. Elston of

Ulin, Dann, Elston & Lambe. Respondent PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin and McGoffin. Court reporters affiliated with Gene Barker & Associates recorded the hearing.

Argument was made, sworn testimony given and exhibits admitted. All Board members have reviewed the record. From the foregoing, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency is an activated air pollution control authority under the terms of the State of Washington Clean Air Act, responsible for monitoring and enforcing emission standards for hazardous air pollutants, including work practices for asbestos. PSAPCA has filed with the Board certified copies of its Regulation I (including all amendments thereto).

The Board takes official notice of the Regulation (as amended).

II

Central Industries, Inc. ("Central") is an asbestos removal company in existence since 1985. (Prior to then its name was Central Painting.) Baugh Construction hired Central to remove and dispose of all asbestos from buildings located at or near 1105 James Street in Seattle, Washington prior to the buildings' being demolished.

III

The PSAPCA Notice and Order of Civil Penalty alleges that Central, inter alia, violated WAC 173-400-075 and Regulation I on or about

January 22, 1987, at the above address, by failing to:

1. remove all asbestos from a facility prior to its wrecking or dismantling (Reg. I, Section 10.04(a));

2. collect for disposal at the end of the working day the removed asbestos. (Section 10.04(b)(2)(iii)(B));

3. contain that asbestos removed or stripped in a controlled area at all times prior to transportation for disposal (Section 10.04(b)(2)(iii)(C)); and

4. treat the asbestos with water and seal it in leak-tight containers while wet (Section 10.05(b)(1)(iv)).

A $1,000 fine was assessed.

IV

Asbestos is a substance which has been specifically recognized for its hazardous properties. It is classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous air Pollutants (NESHAPS). It is a substance which by Federal Clean Air Act definition:

> causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irrecersible, or incapacitating reversible illness. Section 112.

Savage Enterprises, Inc. v. PSAPCA, PCHB No. 87-164 (March 28, 1988), citing Kemp Enterprises, et al. v. PSAPCA, PCHB No. 86-163 (February 18, 1987).

V

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1). PSAPCA has adopted its own regulations on removal of asbestos, designed to meet or exceed the requirements of the federal/state regulations. PSAPCA Regulation I, Article 10. PSAPCA's regulations govern work practices.

VI

On January 22, 1987, a trained PSAPCA inspector, assigned to a routine inspection of a demolition project at 1105 James Street, Seattle, Washington, went to the site. The demolition included several woodframe multi-unit buildings in a half-block area at James and Boren Streets intersection. The first inspector was joined on-site by a second inspector. No Central personnel were seen on-site that day. Demolition was already underway, and a "cat" was scooping up debris for disposal. Hoses were being used to control dust.

The inspectors went to an area, formerly a room north of the boiler room where they saw material that looked like asbestos. In the former boiler room itself on the floor of the foundation, they saw among the debris, pieces that appeared to be asbestos. Several pieces were the size of an inspector's fist. Photographs and a sample (3 to 4 teaspoons) were taken. The material was water-soaked. The sample was labeled and a chain of custody prepared. Tests conducted revealed that the sampled material contained 50% chrysotile asbestos.

VII

Prior to January 22, 1987, Central had been removing asbestos from the buildings, including asbestos from pipe chases that were below the building's floors, but above the cement foundation. In at least five previous PSAPCA inspections, the inspector had seen Central workers removing asbestos at this site, but had observed no violations.

Central's workers had inspected the building prior to demolition, found no remaining asbestos, and told the demolition company to proceed. Central's foreman on January 21, 1987 did an inspection during demolition and saw no asbestos. Central had an independent air pollution reading done and it produced nothing to indicate the presence of significant amounts of ambient asbestos fibers.

VIII

Based upon the inspection, PSAPCA issued Notices of Violation (Nos. 021517 and 021518), and thereafter Notice and Order of Civil Penalty (No. 6680) which is the subject of this appeal to the Board.

IX

Under all the facts and circumstances, we find that it is more probable than not that the asbestos pieces found in the former boiler room at the demolition site were the result of Central's work. Central had a responsibility to remove all asbestos prior to demolition and failed to do so.

X

Central admitted to two prior penalties for violating asbestos regulations. Both were paid, although the company maintains that one

of them was issued in error.

XI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the parties. Chapter 43.21B RCW. The case arises under PSAPCA Regulation I, Section 10, implementing the Washington Clean Air Act, Chapt. 70.94 RCW.

II

We conclude that the material tested was "asbestos material" as defined by Regulation I, Section 10.02(e).

Regulation I, Section 10 provides for liability on a strict basis; negligence need not be found. This strict liability standard supports the goal of preventing harm, because asbestos is a hazardous material which may reasonably be anticipated to cause serious irreversible illness. (See Finding of Fact IV, infra).

Any diligence undertaken by appellant would be weighed against the amount of the fine, rather than negate basic liability.

III

We conclude that Central violated Regulation I, Section 10.04(a) by failing to remove all asbestos prior to the demolition. Moreover, Central employees affirmatively told the demolition company to

proceed. None of the exemptions to 10.04(a) have been alleged, nor evidence submitted, therefore we need not address them.

IV

We conclude that uncontained asbestos pieces left as a result of Central's work violated Regulation I, Sections 10.04(b)(2)(iii)(B) and (C).

V

We conclude that Central violated Regulation I, Section 10.05(b)(1)(iv). The company behaved as if its work was concluded, and demolition was underway. The asbestos found was wet, but it was in the open air awaiting disposal, and not in a leak-tight container. That situation constituted that very condition this regulatory work practice was designed to prevent, i.e. at the conclusion of the asbestos work, all asbestos is to be disposed of properly in leak-tight containers. Kent School District and Savage Enterprises v. PSAPCA, PCHB Nos. 86-190 and 195. (November 6, 1987). Since Central had completed the job (in its view), its disposal duty clearly had arisen. Id.

V

In concluding that violations have occurred, we find unpersuasive appellant's legal argument that the Notice and Order of Civil Penalty so lacked particularity that the penalty must be dismissed. Pleadings in civil penalty serve primarily a notice function. Marysville v. PSAPCA, 104 Wn.2d 115, 702 P.2d 469 (1985). We conclude the Notice

and Order fulfilled that function.

Furthermore, the engines of pre-trial discovery (as encompassed by Superior Court Civil Rules) were available to appellant to more precisely focus the case, should the pleadings pose questions. WAC 37-108-031. Northshore School District #417 and Savage Enterprises, Inc., PCHB No. 86-179 (March 22, 1988). There is no indication that appellants availed themselves of such procedures.

VI

The purpose of civil penalties is to promote future compliance with the law, both by these parties and the public at large. Kent, supra, citing AK-WA, Inc. v. PSAPCA, PCHB No. 86-111 (February 13, 1987). The reasonableness of penalties is based upon several factors, including the scope of the violation and appellant's conduct.

We conclude that Central's efforts merit some reduction of the penalty. The reduction is to some degree lessened by Central's prior record.

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

Notice and Order of Civil Penalty is AFFIRMED, with the $1,000 penalty reduced to $750.

SO ORDERED this 30th day of August, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF STANLEY METCALF SHAKE MILL, Appellant, v. OLYMPIC AIR POLLUTION CONTROL AUTHORITY, Respondent.	PCHB No. 87-95 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of a civil penalty of $250 for the alleged violation of Olympic Air Pollution Control Authority Regulation I, Section 3.05 came on for hearing in Lacey on October 23, 1987, before the Pollution Control Hearings Board, Lawrence J. Faulk (Presiding), Wick Dufford and Judith A. Bendor.

Appellant Stanley Metcalf Shake Mill was represented by its owner, Mr. Stanley Metcalf. Respondent Olympic Air Pollution Control Authority (OAPCA) was represented by its attorney Fred D. Gentry.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Appellant Stanley Metcalf Shake Mill is a company located in Amanda Park, Washington, a small community located in a remote, sparsely populated part of the Olympic Peninsula. On the company's site are two buildings, the shake mill itself and a shop. The shop is a windowless structure, approximately 50' by 60', located a short distance from the mill.

II

Respondent OAPCA is a municipal corporation with the responsibility for conducting a program of air pollution prevention and control in a multi-county area which includes the site of appellant's plant.

OAPCA, pursuant to RCW 43.21B.260, has filed with this Board a certified copy of its Regulation I (and all amendments thereto) which is noticed.

III

On the afternoon of March 12, 1987, at approximately 4:20 p.m. respondent's inspector was driving through Amanda Park in an agency vehicle, marked with the OAPCA insignia. He had just picked up some ambient air monitoring samples. He was dressed in ordinary street clothes. As he drove by, he noticed smoke coming from appellant's

mill. He turned in to appellant's property and parked about 30 feet from the shop. No one was observed outside on the site. Dim light issued from the partially-opened shop door. He walked over to the shop and walked in the door. The appellant and his wife were at the far end of the building away from the door. The appellant was cutting steel with a torch and wore dark goggles to shield his eyes from the flame. Mrs. Metcalf was painting plywood. The lighting was poor.

The inspector displayed no badge, showed no identification, wore no uniform. The Metcalfs had not previously met him. The agency truck outside was not visible to them. They were startled by the inspector's sudden appearance. They did not know who he was.

The inspector did not introduce or identify himself. He asked Mr. Metcalf if the burner was his and received an evasive reply. He told Metcalf the mill's burner was smoking, ordered him to turn on the blowers and said he would get the sheriff, if necessary, to obtain compliance.

Metcalf, a large man, shut off his torch, took off his goggles and moved forward. He told the inspector to get the hell out of there. The inspector ran to his truck and took off. The entire episode happened quickly, probably taking no more than a minute.

IV

On April 23, 1987, after arrangements were made by phone a follow-up inspection was conducted by the inspector. The appellant was cooperative with the inspector during this follow-up inspection.

V

On May 11, 1987, Notice of Violation (No. 000182) was issued to Stanley Metcalf alleging a violation of Section 3.05 of OAPCA Regulation I on March 12, 1987. Section 3.05 states:

> No person shall willfully interfere with or obstruct the Control Officer or any Authority employee in performing any lawful duty.

VI

On May 14, 1987, a Notice and Order of Civil Penalty was sent to appellant assessing a penalty of $250 for allegedly violating OAPCA Regulation I, Section 3.05. From this, Mr. Metcalf appealed on June 9, 1987.

VII

The remoteness of the locale influenced what happened between the inspector and Mr. Metcalf. It contributed to insecurity and lack of cooperation by both parties.

VIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW.

II

As noted, OAPCA Regulation I, Section 3.05 prohibits willful obstruction of an agency inspector's performance of duty.

Section 3.01(e) sets forth a related provision:

> For the purpose of investigating conditions specific to the control, recovery or release of air contaminants into the atmosphere, the Control Officer or his duty authorized representative shall have the power to enter upon any private or public property, with the permission of the owner or his duly authorized representative.

III

Reading Section 3.05 and Section 3.01(e) together, we conclude that the duty of cooperation does not arise until the inspector's identity is clearly known, and the owner has the opportunity to consent to the inspector's presence. Such identity could be aided by

badges, uniforms, or a clear statement by the inspector at the very outset of his authority status.

Here it is clear that both the inspector and the appellant reacted hastily in the heat and dimness of the moment. Neither would contend it was their finest moment. However, under all the facts and circumstances, we hold that no violation of Section 3.05 was shown.

Cooperation is, of course, the key to an effective program of air pollution prevention and control. All parties here have shown themselves capable of cooperation when identity is clear and heads are cooler. Now that Mr. Metcalf knows this OAPCA inspector, he no longer can claim ignorance of his identity.

IV

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The Notice an Order of Civil Penalty in the amount of $250 issued by OAPCA to Stanley Metcalf Shake Mill is VACATED.

DONE this 18th day of February, 1988.

POLLUTION CONTROL HEARINGS BOARD

2/18/88

LAWRENCE J. FAULK, Presiding

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

R. JAMES CONSTRUCTION, INC., Appellant, v. OLYMPIC AIR POLLUTION CONTROL AUTHORITY, Respondent,	PCHB No. 87-96 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $100 civil penalty ($50 suspended) for outdoor burning allegedly in violation of Section 9.01 of respondent's Regulation I. came on for hearing before the Pollution Control Hearings Board, Wick Dufford (presiding) and Judith A. Bendor, convened at Lacey, Washington on November 24, 1987. Respondent elected a formal hearing.

Appellant, R. James Construction, Inc., was represented by James Femling, President. Respondent, Olympic Air Pollution Control Authority (OAPCA) appeared through its attorney Fred D. Gentry. The testimony was transcribed by court reporter Cheri L. Davidson.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board make these

FINDINGS OF FACT

I

Respondent OAPCA is a municipal corporation with the power to implement and enforce a comprehensive program of air pollution prevention and control in a multi-county area which includes Thurston County and the site of the alleged violation.

OAPCA has filed with this Board a certified copy of its Regulation I of which official notice is taken.

II

Appellant is a business operating in Thurston County. On May 21, 1987, an agent of the company was issued an Open Burning Permit jointly by OAPCA and the Olympia Fire Department for burning at 2940 Limited Lane in Olympia, Washington.

The permit authorized open burning at the site from May 21 to June 21, 1987, subject to numerous conditions. Among these were the following:

> No material containing asphalt, petroleum products, paint, rubber products, plastic, or any substance which normally emits dense smoke or obnoxious odors will be burned.
>
> Person must be in attendance at all times.

III

On the morning of May 26, 1987, OAPCA's inspector received a complaint concerning ash fallout at the Harrison Park Apartments near the National Cable Television headquarters property which was the site of appellant's fire. Arriving at the site and inspecting the site between 10:00 and 10:15 a.m., the inspector observed plastic sheeting in the burning debris pile. He took photographs of the material to verify his observations.

When he arrived at the site, the inspector observed no one in attendance minding the fire. Ten or more minutes later appellant's president, Mr. Femling appeared on the scene.

The inspector issued a Notice of Violation (No. 1002-87) concerning the incident, describing two asserted permit violations: "No man in attendance" and Burning plastic."

IV

On June 1, 1987, OAPCA issued a Notice of Civil Penalty Assessment relating to the matters which were the subject of the inspector's Notice of Violation. The Notice assessed a fine of $100, with $50 of this amount being suspended. Under "Conditions," the Notice stated (in pertinent part): "FIRST VIOLATION: Fifty suspended dollars will be added to any future violation."

V

Appellant's fire was lighted early on the morning of May 26, 1987, and supervised by appellant's president Mr. Femling until it had burned down from its initial intensity. Then feeling the call of nature he left the fire unattended for 10 to 15 minutes.

He asked some workers at a nearby building to keep an eye on things while he was gone. They were, however, not in a position to see the fire. When Femling returned, the OAPCA inspector was on the scene.

VI

OAPCA's inspector did not see any plastic sheet actually burning. The sheets he saw were close to, but not in, the flames he photographed. Femling says he pulled out all the plastic material he could see before igniting the burn pile in an effort to avoid burning any plastic. However, he was not sure what was in the debris pile, which had been built by others.

On a consideration of all the evidence, we find it more likely than not that plastic material was burned.

VII

Appellant has no prior record of any open burning violation. Moreover, it has been cited with no further open burning infractions by OAPCA since the date in question.

VIII

Any Conclusion of Law which is deemed a Finding of Fact is adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

OAPCA's Regulation I, Section 9.01 requires a permit for the commercial open burning being conducted in the instant case. Subsection (c) thereof provides for the imposition of conditions in such permits. Subsection (g) thereof prohibits in any fire (other than fire fighter training fires) the burning of

> garbage, dead animals, petroleum products, paints, rubber products, plastics, or any substance which normally emits dense smoke or obnoxious odors...

II

Based on our findings we conclude that appellant violated Section 9.01(c) when he failed to observe the permit condition requiring a person to be in attendance at all times.

The reason for his absence, though recognized commonly as a matter of urgency, cannot excuse the violation. It would have been easy enough to provide someone to fill in. Leaving a fire unattended can lead to serious consequences. In any event, the Clean Air Act and Regulation I implement a strict liability scheme. Explanatory matters do not operate as excuses.

III

We likewise conclude that appellant violated the prohibition against the burning of plastics contained in Section 9.01(g).

IV

We recognize that this is appellant's first and only violation of OAPCA's regulations to date. However, OAPCA has also recognized this fact and tailored its penalty to the situation. In light of the statutory maximum of $2000 for the two violations alleged, RCW 70.94.431, we conclude that the penalty assessed here was entirely reasonable.

I

Any Finding of Fact which is deemed a Conclusion of Law is adopted as such.

From these conclusions the Pollution Control Hearings Board makes this

ORDER

The $100 civil penalty ($50 suspended) which was appealed from is hereby affirmed.

DONE at Lacey, Washington this 12th day of January, 1988.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding

Judith A. Bendor

JUDITH A. BENDOR, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MAX E. BENNINGFIELD, JR., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 87-108 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of a Notice of State Regulation (posting) requiring a reduction in the number of acres being irrigated came on for formal hearing before the Pollution Control Hearings Board in Yakima, Washington, on July 28, 1987, and September 8, 1987. The case was heard by Wick Dufford, Chairman. Board members Lawrence J. Faulk and Judith A. Bendor have reviewed the record and join in this decision.

Appellant was represented by J. Jarrette Sandlin, Attorney at Law. Respondent was represented by Peter R. Anderson, Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

In the late summer and fall of 1977, Max E. Benningfield, Jr., appellant herein, filed two applications for the appropriation of public groundwaters from a well in the Black Rock area of Yakima County. His applications were approved, permits were granted and, upon proof of appropriation two certificates of water right were issued to him on March 12, 1979. Each certificate was limited to a maximum withdrawal rate of 293 gallons per minute and an annual quantity of 212 acre feet. Two acre feet in each were allocated to domestic supply and stockwater; the remaining 210 acre feet were designated for use from March 1 to October 31 for the irrigation of 40 acres. Each certificate described a different 40 acre area as the place of use.

Thus, Benningfield acquired in the aggregate a right to apply 420 acre feet per year to 80 acres of land. This translates to an allowed duty of water of slightly more than 5 feet per acre.

II

Benningfield testified that he used the full water duty on the acreage from 1978 through 1984, growing alfalfa hay with three cuttings per growing season. However, in 1985 he switched to wheat, requiring about one-half the water he had been using. This year, 1987, he changed crops again, growing alfalfa for seed, needing from one-third to one-half as much water as he did originally with hay.

III

Prior to switching to less water intensive crops, Benningfield sold a portion of his certificated rights to Yakima County which was then developing a park nearby. The County purchased the rights, rather than initiating its own appropriation, because the Department of Ecology (DOE) has closed the Black Rock area to further appropriation until completion of a study to determine if there are limitations on the groundwater resource there. A number of applications for new appropriations are pending.

IV

Benningfield's intention was to sell the County an annual right to 50 acre feet of water -- 25 acre feet from each of his certificates. The sale was the subject of a meeting in February 1985, attended by Benningfield and by representatives of the County and of DOE. At this meeting DOE advised Benningfield that the sale of the water would result in a cutback of 10 acres in the rights he retained -- 5 acres from each certificate.

Benningfield went ahead with the transaction entering into an agreement to sell the 50 acre feet for $37,400 on March 8, 1985. The sale was expressly made contingent upon final approval by DOE. Subsequently, on March 15, 1985, Benningfield signed documents prepared by DOE assigning a portion of his rights from both

certificates. Each assignment bears the following written notation: "assignment of 100 gpm, 25 acre-feet per year for the irrigation of five acres."

V

Yakima County applied for and was granted a change of point of withdrawal and place of use for that portion of Benningfield's rights which it had purchased. DOE's approval of this change on May 24, 1985, was accompanied by a detailed Report of Findings of Fact and Decision in which the agency discussed the transfer which was being permitted and the terms of its approval. The Report contained the following:

> Groundwater Certificates No. G4-25445C and No. G4-25590C each authorized 295 gpm, 212 acre-feet per year from a well for the irrigation of 40 acres from March 1 to October 31 and single domestic supply. The place of use on G4-25445C is the NE 1/4 NW 1/4 of Section 27 and the place of use on G4-25590C is the SE 1/4 NW 1/4 of Section 27, all in T12N, R21E W.M. A total of 80 acres of hay has been irrigated. Upon approval of the application for change, five acres under each certificate will no longer be irrigated. Both certificates issued to Max E. Benningfield, Jr. He has agreed to sell the County, upon approval of the Department of Ecology, 100 gpm, 25 acre-feet per year for the irrigation of five acres from each of the certificates. If approved, the County would have the authority to use 200 gpm, 50 acre-feet per year for the irrigation of ten acres. (Emphasis added).

A copy of this Report and the decision to approve the changes the County applied for was sent to Benningfield. No appeal of the decision was filed.

VI

On February 6, 1986, DOE issued two superseding certificates to Benningfield, reflecting the change in his rights as a result of the sale to the County. Each certificate was reduced by 25 acre feet as to annual quantity and bore the further descriptive limitation: "185 acre-feet per year to be used from March 1 to October 31 for the irrigation of 35 acres." The description of the place of use remained the same as set forth (describing 40 acre areas) on the original certificates. No appeal was filed concerning issuance of these superseding certificates.

VII

In the spring of 1987, DOE personnel observed that Benningfield had not cut back on the acreage he was irrigating and that more than a total of 70 acres was being irrigated. Accordingly, on May 13, 1987, his withdrawal works were posted with a Notice of State Regulation. The Notice stated that Benningfield's lands under both of his certificates were being irrigated in excess of his rights and ordered him to refrain from irrigating more than 35 acres within the described place of use on each certificate. The posting was followed by mailing of the Notice to Benningfield by certified mail on May 15, 1987. The letter of transmission asked Benningfield to identify the 35 acres to be irrigated in each of the 40 acre areas described in his certificates.

VIII

An appeal to this Board followed on June 16, 1987. Benningfield challenged the Order to cut back his irrigation to 70 acres and requested a stay of the Order pending the hearing and decision on his appeal. The stay motion was argued on June 19, 1987 and granted by Order dated June 29, 1987. The stay was renewed after the hearing on July 28, 1987, to be dissolved upon the rendition of the Board's Final Order herein.

IX

Appellant Benningfield's father owns a one-half interest in the acreage in question. He asserts that he was not notified of the issuance of the superseding certificates, although he was aware of and approved of the sale of a portion of the rights to the County. Mr. Benningfield, Sr.'s interest is not disclosed on the documents relating to these water rights.

X

Appellant Benningfield concedes that he has been irrigating more than 70 acres during the present growing season. His appeal is based on the assertion that he is legally entitled to do so.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From the Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

Benningfield has raised several constitutional issues. We decline to consider them on the grounds that this Board's jurisdiction does not extend to the resolution of such questions. See Yakima County Clean Air Authority v. Glascam Builders, 85 Wn. 2d 255, (1975).

II

Benningfield makes five legal arguments under the water codes:

(1) He asserts that his two assignments of "25 acre-feet per year for the irrigation of five acres" described what was granted to the County but did not operate to reduce the authorized number of acres to be irrigated on his own farm. In other words, he maintains that he only sold rights to a specified annual quantity of water, not any rights to irrigate land area.

(2) He asserts that he is entitled to irrigate more than 70 acres within the two described places of use, so long as he does not exceed the aggregate of 370 acre feet annually allowed under his certificates.

(3) He asserts that he is entitled to irrigate the entire 80 acres described on his certificates during any growing season by "rotating" water among acres so that the entire acreage is not being irrigated at once.

(4) He asserts that DOE has unreasonably withheld permission to engage in the "rotation" described in (3).

(5) He asserts that DOE's issuance of the superseding certificates was defective for failure to notify Max E. Benningfield, Sr.

We will deal with these assertions in the order listed.

III

An appropriation right for irrigation is appurtenant to the land on which it is used. RCW 90.03.380. Therefore, when such a right is transferred and becomes appurtenant to new lands at a different location, no right to irrigate the original situs remains. See RCW 90.44.100; Schuh v. Department of Ecology, 100 Wn.2d 180 (1983).

Benningfield apparently wanted to transfer a quantity of water, while retaining use rights appurtenant to all his acres. However, his subjective desires in this matter are immaterial. The transaction, approved by DOE, involved the removal of rights from some of Benningfield's acres and their contemplated attachment to acres somewhere else. This effect occurred by operation of law when the transfer was made. Benningfield was without power to sell irrigation rights free of the operation of the appurtenance principle.

IV

The appurtenance principle has a corollary in the doctrine of beneficial use. The authorized duty of water for an acreage is merely a maximum quantity, up to which water can be applied in any year. But, each growing season the right for any acre is limited to the actual amount (within the maximum authorized) which is needed to grow the crop

selected. To use more would violate the limitation imposed by the doctrine of beneficial use and constitute prohibited waste. See RCW 90.03.005.

Thus, if a farmer has acquired a right to irrigate 80 acres, he has 80 acres worth of water which is variable in quantity depending on the requirements of the particular crop being grown. Should the farmer switch from a water-intensive crop to one requiring less water, his water right after the switch would be only to the amount needed for the new crop. Following such a crop change, he would not have any right to the no-longer-required amount previously used. He would have no such "surplus" to sell. He would have no such "surplus" to spread out over more acres.

When an irrigator sells a specified annual quantity of water, he is, in essence, selling the authorized maximum duty of water appurtenant to a certain number of acres. By the sale he is reducing his rights to irrigate by that number of acres. A change in his cropping pattern does not, by some alchemy, return to him the right to irrigate those acres.

We conclude, then, that Benningfield is not entitled to irrigate more than 70 acres, even if he remains within the acre-footage authorized by his certificates.

V

The notion that a right to irrigate an identified number of acres can be enlarged to irrigate a larger number of acres by simply moving

the water around while staying within the authorized maximum water duty is a variation on the same theme. We discussed this question in Kummer v. Department of Ecology, PCHB No. 85-188 (January 20, 1987). That case is on all fours with the instant one. There, as here, the certificates specified the number of acres to be irrigated within a larger described place of use. There, as here, the right holder, without appealing issuance of the certificates, sought to apply water annually over the entire described place of use in amounts not exceeding the authorized duty specified for a smaller number of acres. In Kummer, we noted that rights acquired by irrigators under the water codes must be within the scope of the permission granted by the state. We then said.

> With respect to the legally described places of use the Kummers have sought authority to irrigate, Ecology has imposed explicit and unambiguous limits. Under each certificate only 15 acres may be beneficially irrigated during any year. By logical necessity this restricts irrigation under each certificate to the first 15 acres irrigated in the year. The total number of acres on the farm which may be irrigated is thus 30 per annum.
>
> As a matter of law, the Kummers simply have not acquired the right to irrigate more than this. (Emphasis added).

Such reasoning applies here. Benningfield possesses no right to irrigate acreage exceeding the limits in his superceding certificates.

VI

The record does not disclose that Benningfield has ever asked DOE

for permission to engage in "rotation" of water. RCW 90.03.390 empowers DOE to allow "rotation", but appellant has misconceived the term. True "rotation" involves allowing differing users to alternate their use from one day to the next when the supply is not sufficient to satisfy all simultaneously. What appellant here seeks is not "rotation", but acreage expansion beyond the authorized limits of his certificates. Permission for this has not been unreasonably withheld. Even if it had been requested, it could not lawfully be permitted.

VII

If DOE failed to notify Max E. Benningfield, Sr. of the issuance of the superseding certificates, no error was committed. The law does not require that a person be the owner in fee of the realty in order to apply for or acquire a water right on a tract. RCW 90.03.250; RCW 90.44.066. Moreover, it is quite possible for the owner of water rights on a piece of land to be different from the owner of the fee interest. See Weintensteiner v. Enghahl, 125 Wash. 106 (1923). Therefore, the senior Benningfield's interest in the property was not something which DOE had an obligation to discover or which imposed on the agency any duty. If Mr. Benningfield, Sr. wanted notice, he should have taken steps to request it.

VIII

The short answer to all of appellant's arguments is that his failure to appeal the issuance of the superseding certificates now forecloses his effort to overturn the limitations they contain. RCW

43.21B.120. However, the superseding certificates issued by DOE to Benningfield embody the understanding of the law set forth above, and we believe that understanding is correct.

In sum, we hold that appellant's arguments must be rejected and that DOE's posting of Benningfield's well must be upheld.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Notice of State Regulation issued by the Department of Ecology to Max E. Benningfield, Jr., on May 13, 1987, is AFFIRMED.

DONE in Lacey, Washington, this 5th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Lawrence J. Faulk 11/5/87
LAWRENCE J. FAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DBM CONTRACTORS, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB NO. 87-161 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of a notice and order of civil penalty of $500 for outdoor burning, allegedly in violation of Section 8.0510 of respondent's Regulation I, came on before the Board, Lawrence J. Faulk (Presiding), and Judith A. Bendor (Member), in Seattle, Washington on December 14, 1987. Wick Dufford (Chairman) has reviewed the record. Respondent Agency elected a formal hearing. Lettie Hylarides reported the proceedings.

DBM Contractors, Inc., was represented by its Safety Director, William Richeson, appearing pro se. Respondent Puget Sound Air Pollution Control Agency was represented by its attorney, Keith D. McGoffin.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard.

From the testimony, evidence and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency (PSAPCA) is an activated air pollution control authority, empowered to enforce outdoor open burning regulations in a multi-county area which includes Snohomish County and the site of the instant open burning incident.

The agency has filed with the Board a certified copy of its Regulation I and all amendments thereto, of which we take official notice.

II

DBM Contractors, Incorporated, is a general contractor with offices in Federal Way, Washington, at 1220 South 356th.

III

On March 6, 1987, a fire fighter from the Sumner Fire Department received a complaint about an outdoor fire at or near Highway 167 and 8th Street, Sumner, Washington. The Sumner Fire Department responded to the complaint and proceeded to the scene of the fire. There he observed two burning piles of debris which he estimated to be eight feet high and 10 feet across each. The piles contained scrap plywood, and laminated beams. The fire department extinguished the fires and

discussed burning regulations with the people attending the fire. The fire fighter determined that the fires had been started by employees of DBM Contractors, Inc.

IV

On March 9, 1987, PSAPCA was contacted by Sumner Fire Department concerning the fires extinguishd on March 6, 1987. PSAPCA had in its files no record of a permit authorizing the burning of processed wood products by DBM.

V

PSAPCA mailed a Notice of Violation to DBM Contractors on March 9, 1987, asserting a violation of Regulation I, Section 8.05 by causing or allowing an outdoor fire other than land clearing or residential burning without prior written approval from PSAPCA. Subsequently, on May 29, 1987, the agency issued Notice and Order of Civil Penalty No. 6686 assessing a fine of $500 for the incident. On July 1, 1987, DBM Contractors filed a notice of appeal with this Board.

VI

DBM Contractors, Inc., does not contest the fact that the fires were burning, nor that the fires contained plywood and laminated beams. The company's contention is that its management knew nothing about the fires on March 6, 1987, and did not authorize the fires, and therefore they should not be held responsible for them.

We find, however, the burning was conducted by DBM employees.

VIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such

From these Findings, the Board comes to these

CONCLUSIONS

I

The Board has jurisdiction over these persons and these matters. Chapter 70.94 and 43.21B RCW

II

The Legislature has enacted the following policy on outdoor fires:

> It is the policy of the state to achieve and maintain high levels of air quality and to this end to minimize to the greatest extent reasonably possible the burning of outdoor fires. Consistent with this policy, the legislature declares that such fires should be allowed only on a limited basis under strict regulations and close control. RCW 70.94.740.

III

PSAPCA's Regulation I, Section 8.05 provides:

> It shall be unlawful for any person to cause or allow any outdoor other than land clearing burning or residential burning except under the following conditions:
>
> (1) Prior written approval has been issued by the control officer or Board. . . .

IV

We conclude that the fires in question were started by employees of the appellant without prior written approval of respondent agency. The burning of processed wood products is outside the definition of both land clearing burning and residential burning. Sections 1.07(y) and (pp). Consequently, we hold that the company violated Section 8.05.

V

The civil penalty assessed here ($500) is not the highest penalty that could have been assessed pursuant to the state Clean Air Act, RCW 70.94.431(1). We note that the purpose of civil penalties is not retribution, but to influence behavior - both of the violators and the regulated public generally.

Considering all the facts and circumstances, we believe the penalty assessed in this instant case is appropriate.

VI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

Notice and Order of Civil Penalty No. 6686 in the amount of $500 is affirmed.

DONE this 14th day of April, 1988.

POLLUTION CONTROL HEARINGS BOARD

4/14/88

LAWRENCE J. FAULK, Presiding

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

DEV/MAR CORPORATION, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 87-163 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a notice and order of civil penalty (No. 6687), assessing $1000 for alleged violations of Article 6 of Regulation I of the Puget Sound Air Pollution Control Agency (PSAPCA), came on for hearing on March 31, 1989, in Everett, Washington, before the Pollution Control Hearings Board; Wick Dufford, presiding, and Harold S. Zimmerman.

Robert Jungaro, owner, represented Dev/Mar. Keith D. McGoffin, attorney at law, represented PSAPCA. The proceedings were reported by Pamela Moughton of Bartholomew & Associates. Witnesses were sworn and testified. Exhibits were admitted and examined. From the testimony heard and exhibits examined, the Board makes the following:

FINDINGS OF FACT

I

Dev/Mar is a construction and development company located in Mukilteo, Washington.

II

PSAPCA is a municipal corporation with authority to conduct a program of air pollution prevention and control in a multi-county area which includes the City of Everett, site of the burning in question.

The Board takes notice of PSAPCA's Regulation I, including Article 8, which deals with causing or allowing outdoor fires.

III

On January 16, 1987, PSPACA issued a Population Density Vertification for land clearing burning to Dev/Mar, confirming that the population within 0.6 miles of the proposed burning site (8605 18th Avenue West, Everett, Washington) is 2500 persons per square mile or less. At the time, Article 8 allowed land clearing burning to be conducted in such relatively sparsely populated areas. Former Section 8.06.

"Land clearing burning" was defined in Section 1.07(y) as follows:

> Land clearing burning" means outdoor fires consisting of residue of a natural character such as trees, stumps, shrubbery or other natural vegetation arising from land clearing projects and burned on the lands on which the material originated.

The Population Density Verification contained the following written warning:

> The outdoor fires must not contain any material other than trees, stumps, shrubbery or other natural vegetation which grew on the property being cleared.

IV

On January 29, 1987, the City of Everett Fire Department issued a permit to Robert Jungaro, owner, for Dev/Mar to conduct "controlled outdoor burning for the purpose of land clearing" at 8605 18th Avenue West, Everett, Washington.

Attached to the permit was a notice which advised that the site had been inspected and a large pile of debris and refuse had been observed, including boards, shingles, composition roofing materials, plastic tarps, pails, metal objects, discarded plastic toys and discarded tires.

The notice stated that none of these items were to be burned and that the permit was only for burning natural vegetation which grew on the property to be cleared.

V

On March 12, 1987, in the early evening, fire inspector Warren Burns arrived at 8605 18th Avenue West to inspect a fire being burned under the Everett Fire Department's permit. He found the fire burning unattended, without a fire watch, containing (in addition to natural vegetation) a rubber tire, concrete blocks, plastic buckets, pieces of sheet metal.

About 30 minutes after the inspector arrived, Robert Becker, Dev/Mar's subcontractor for clearing and burning, appeared and commenced to extinguish the fire with a bulldozer at the fire inspector's request.

VI

The Everett Fire Department advised PSAPCA of its inspection and observations. On March 20, 1987, PSAPCA issued two notices of violation jointly to Dev/Mar and to Robert Becker for burning on March 12, 1987. Notice No. 021909 asserted a violation of Regulation I, Section 8.05(1) and described the violation as "an outdoor fire other than land clearing or residential burning without prior written approval" of PSAPCA. Notice No. 021910 asserted a violation of Regulation I, Section 8.02(3) and described the violation as "an outdoor fire containing prohibited materials such as tires and plastic."

Subsequently, on May 29, 1987, PSAPCA issued to Dev/Mar and to Becker a Notice and Order of Civil Penalty (No. 6687) which assessed an aggregate fine of $1000 for the two violations asserted in the notices of violation referring to March 12, 1987.

On June 2, 1987, Robert Jungaro, for Dev/Mar, filed with this Board a notice of appeal, relating explicitly to Notices of Violation Nos. 021909 and 021910. We find that it was his intention, by this action, to appeal the civil penalty relating to these violation notices.

VII

PSAPCA issued to Dev/Mar another notice of violation and another civil penalty notice for $1000 asserting the burning of prohibited

material at the same site on April 15, 1987. The Board's files disclose no record of any notice of appeal referring to these documents and this incident.

VIII

Prior to the Dev/Mar project, a considerable amount of non-vegetative debris and garbage had been dumped on the burning site by members of the public. On March 10 and 11, 1987, Jungaro had over 100 cubic yards of this material hauled away to an authorized disposal site.

There is no evidence that Jungaro or Becker themselves brought any material in from off-site to be burned.

IX

The burning had been in progress for at least three days before the inspection on March 12th, during which time a fire watch had been on hand. There is no evidence that this watchman observed any debris being brought into the site and placed in the fire by strangers.

The fire watch was absent briefly on the 12th and was not present when Inspector Burns arrived. We are not convinced, however, that the non-vegetative debris found in the fire by the inspector was imported by strangers and placed in the fire during this short hiatus.

X

PSAPCA attempted to introduce into evidence the affidavit of its own inspector, dealing with a follow-up visit to the site after the

report of Inspector Burns inspection was received. The PSAPCA inspector was not present at hearing, having moved to California.

Upon objection, his affidavit was excluded. The Board's Findings concerning the March 12, 1987 fire and the condition of the site are derived solely from the testimony of the Everett Fire Department's Inspector Burns.

XI

PSAPCA's enforcement chief testified as to prior proceedings involving Mr. Jungaro.

Jungaro was held to have violated land clearing burning requirements and to have burn prohibited material in a prior incident occuring some 10 years earlier. Jungaro v. PSAPCA, PCHB No. 77-168 (1978). In the present case, his actions in obtaining permits and in having non-vegetative debris hauled away from the site evidence a knowledge of the applicable regulations restricting burning.

XII

We find Becker acted as Dev/Mar's agent. We find that Dev/Mar caused or allowed the outdoor fire containing the materials observed by Inspector Burns on March 12, 1987.

XIII

We find that the fire consisted primarily of natural residue from land clearing of the site. Although some attempt was made to

rid the site of other debris, the effort was incomplete, and a certain amount of pre-existing non-vegetative debris was also burned. However, we are persuaded that the burning of such debris was incidental to the principal aim of the burning which was to dispose of land clearing wastes generated on site.

XIV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fct, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW.

II

This case has a rather lengthy procedural history of postponements and rescheduling. The Board was obliged to reschedule the matter after the initial hearing date, December 14, 1987. Then, though all parties were present and ready to proceed, other matters took the available hearing time. After several reschedulings, the matter was set for September 13, 1988. On that date, Dev/Mar failed to appear and an Order of Dismissal was entered. Subsequently Jungaro asked that the matter be re-opened on the grounds he had

received no notice of the September 13 hearing. Thereafter, an Order Granting Motion to Reconsider was entered (November 2, 1988), the Order of Dismissal was, in effect, vacated and the matter was rescheduled for hearing. Following one more continuance, the hearing was actually conducted on March 31, 1989.

The absence of PSAPCA's own inspector at hearing doubtless owes something to the extraordinary delay. Nonetheless, his affidavit was excluded on the grounds of its hearsay nature and the inability of appellant to cross examine. That ruling is hereby affirmed.

III

RCW 70.94.740 states, in pertinent part:

> It is the policy of the state to achieve and maintain high levels of air quality and to this end to minimize to the greatest extent reasonably possible the burning of outdoor fires. Consistent with this policy, the legislature declares that such fires should be allowed only on a limited basis under strict regulation and close control.

RCW 70.94.775 states in pertinent part:

> No person shall cause or allow any outdoor fire:
>
> > (1) containing garbage, dead animals, asphalt, petroleum products, paints, rubber products, plastics, or any substance other than natural vegetation which emits dense smoke or obnoxious odors...

IV

At the time of the event in question, Section 8.02 of PSAPCA Regulation I, stated in pertinent part:

> It shall be unlawful for any person to cause or allow any outdoor fire: . . .

(3) containing garbarge, dead animals, asphalt, petroleum products, paints, rubber products, plastics, or any substance other than natural vegetation which emits dense smoke or obnoxious odors ... .

Section 8.05 of Regulation I stated in pertinent part:

It shall be unlawful for any person to cause or allow any outdoor fire other than land clearing burning or residential burning except under the following conditions:

(1) Prior written approval has been issued by the Control Officer or Board ...

Appellant's burning is alleged to have violated both of these regulatory sections.

V

We conclude that the fire burned on May 12, 1987, violated Regulation I, Section 8.02(3)(and RCW 70.94.775) because it contained prohibited materials. We further conclude that Dev/Mar is legally responsible.

VI

However, we conclude that no independent violation of Section 8.05(1) was shown.

VII

Section 8.05(1) refers to burning which is neither land clearing burning non residential burning. Residential burning is not involved here. So, the apparent basis for alleging this violation is the theory that any fire which contains material other than natural vegetation generated on site is outside the definition of land

clearing burning. Section 1.07(y)(quoted in Finding III above).

We do not agree that the mere presence of prohibited materials in what is primarily a land clearing fire gives rise to a separate offense for failure to get a non-land-clearing burn permit. Such a permit, if sought, would be unobtainable because burning prohibited material cannot be allowed.

Thus, the permit requirement in this context is just another way of saying, "Thou shalt not burn prohibited materials." Appellant is being charged with two violations for the same thing.

The State Clean Air Act states that each violation is "a separate and distinct offense." RCW 70.94.431. Implicit in this formulation is, we believe, the intention that each separate and distinct violation requires different acts or consequences on the part of the violator. See Sher-Wood Products, Inc. v. PSAPCA, PCHB No. 85-13 (1985).

If appellant had hauled material in from another site to burn, the definition of land clearing burning would have been violated and a permit would have been required. Such action would constitute a separate substantive offense. See Lloyd Enterprises v. PSAPCA, PCHB 85-155 (1985).

Moreover, if the burning in question were shown to involve non-vegetative materials to such an extent that the burning of these materials could be said to be more than incidental to what is primarily a land clearing fire, then a separate and distinct

violation would be made out. But, the record does not so persuade us in this case.

VII

The $1000 penalty in this case is based on two asserted violations. Having concluded that only one of these violations should be sustained, we turn to whether the amount of penalty is appropriate.

Analysis of this issue involves a consideration of factors bearing on reasonableness, including:

(a) the nature of the violation;

(b) the prior behavior of the violator;

(c) actions taken after the violation to solve the problem. Puget Chemco, Inc. v. PSAPCA, PCHB No. 84-245 (1985).

On the record before us, the violation appears to have been the result of a lack of thoroughness in segregating materials from the burn piles in circumstances where the violator knew or should have known what could and couldn't be burned. However, serious air pollution consequences were not shown.

Jungaro personally (not Dev/Mar) was shown to have violated land clearing burning and prohibited materials regulations 10 years earlier, but that event, remote in time, does not constitute a prior pattern of corporate violations.

A notice of violation and penalty were issued to Dev/Mar for burning prohibited materials a month later at the same site.

However, under the circumstances, we are unwilling to accept these bare citations as proving the facts they assert, and have not considered them as establishing appellant's post-offense behavior. We do note, however, that Dev/Mar's employees readily complied with the instructions given at the site by Inspector Burns.

VIII

Dev/Mar argues that its appeal includes the notice of violation and civil penalty relating to April 15, 1987. As noted in our Finding VII, we disagree. The appellants pleadings make no reference to either of these documents.

Accordingly, we hold that no appeal of the asserted violation and penalty relating to April 15, 1987, is or has been before us. RCW 43.21B.300(2) provides a 30 day appeal period after a civil penalty is received by the person penalized. The time to appeal these later citations had long since passed by the time this matter came to hearing.

IX

Under all the facts and circumstances, we believe that the maximum allowable penalty is unwarranted for the single violation of burning prohibited materials on the date in question (March 12, 1987). The following Order is, we decide, appropriate.

X

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

ORDER

The violation of Section 8.05(1) of Regulation I is reversed.

The violation of Section 8.02(3) of Regulation I is affirmed.

The penalty is abated to $500 and affirmed in that amount.

DONE this 14th day of September, 1989.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Presiding

HAROLD S. ZIMMERMAN, Member